No. 5874

IN THE

United States Circuit Court of Appeals

IN AND FOR THE NINTH JUDICIAL CIRCUIT
IN EQUITY

CHARLES A. BURCKHARDT,
vs.
NORTHWESTERN NATIONAL BANK, et. al.,
Respondents.

FRED A. BALLIN,
Appellant,
vs.
THE NORTHWESTERN NATIONAL BANK, et. el.,
Respondents.

Reply Brief of Appellants

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LANE-MILES STANDISH CO.

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Reply Brief of Appellants

The Court kindly granted leave to the Appellants for reply brief to meet the matters on oral argument and in the brief of Respondents.

The cases made on appeal are both accounting cases, and there has never been any deviation. It is, therefore, an untrue and designed statement to say that the cases were brought to prevent the collection of debts in which respect these same directors for the bank, through their attorneys, defied the primary jurisdiction of the Federal Court and sought by attachment process in the State Court to collect the amount of their respective demands against complainants, ***within the period that there was time to take this appeal;*** and to save their property the complainants paid, believing that equity would ultimately prevail.

So it is manifestly unfair for the respondents to present any such misstatements now to the Court. Paragraph 22 of the Ballin bill, Record, page 191, and Paragraph 21 of the Burckhardt Bill, Record, page 28, fully disclose the record.

It is constantly reiterated that Olmstead did not appear by counsel. On the contrary his counsel did appear and took part in the case by their personal presence; but they did not join in with the other defendants, nor adopt their tactics.

The appellants presented upon the argument that as early as the year 1925 the bank situation was considered acute and was so pointed out to these respondents by the officers of the Treasury Department of the United States; and yet these officers and directors who are the defendants in this case, persisted in the same inactive policies and carried those policies on to the point of destruction of the bank, as the evidence shows.

The brief of respondents, pages 28 and 29, as well as the statements of Mr. Hart on oral argument, particularly assert ***that no one knew or had cause to know or means of notice of the stupendous transactions of Wheeler through this bank extending over a period of years,*** and that the time subordinates learned thereof ***was indefinite in the record.*** On this matter of knowledge and notice on the part of Skinner, Stewart and Price, and upon the part of Metschan, Charlton and Spaulding, there is no doubt whatever in the record.

It will be seen that the Examining Committee in 1924, with what they denominate as meticulous care, were specifying items and calling specific and particular attention of the Directors as the Examining Committee to what they wished done. It is noticeable that upon November 18, 1925, the Comptroller was telling them what to do and they disobeyed, and that this meticulous care fell off and their inaction commenced as Directors, Examining Committee and Executive Committee and even as officers ***following October 9, 1924.***

The statement embodied in the record commencing at page 331 of Volume I is chronological and the Court will be aided immensely by reading the actual record facts from the bank's own papers of what these men did and did not do, according to their own minutes.

In these aspects, too, we must remember that the appellants had to seek information from their trustees and officers of this bank, and that in order to make such case as was made, every fact had to be drawn out to meet the contrary theories of the criminal case tried by the same Court, and the constant bickering and contentions of counsel ***that evident facts had to be otherwise interpreted than they actually were.***

The concluding clauses of each of the bills of complaint are substantially similar and pray for the taking of the account, and reasons why and for the restraint of the defendants in their acts and doings, and that they be required to do the things that will enable equity to grant relief. Record, pp. 28 to 33 for Burckhardt Complaint, and Record, pages 190 to 195, for Ballin Complaint.

It will be remembered that the only source complainants could get testimony or information from in any way whatever would be the bank officials, these directors and their officers, who will not be permitted to say now: "We did what was right and nobody can question what we did or examine into how we did it." See main brief *Jones v. Yates*, 240

U. S. 563, at p. 112 of the brief, and *Thomas v. Taylor*, 224 U. S. 82, top of p. 113 of the brief.

We respectfully submit that the record shows on this ***question of notice and means of notice and knowledge***, the following important things:

At page 371, as reported by Directors Spalding, Metschan and Charlton, that October 14, 1924, they found slow loans in the bank which then amounted to more than $3,600,000.00, and there were $2,000,000.00 of combined loans in the bank whose balances were not compensating.

At page 384, top of the page, impairment of capital suggested by the Treasury Department, November 18, 1925.

At page 575, HOYT, July 1926, $81,000.00, "Cash Items."

HOYT, August 13, 1926, $218,770.00. "Cash Items."

At page 576 are the questions of the Court to HOYT, and his answers.

At Record, pp. 579 to 581, is the testimony of YOUNG. Page 580, Cash Items, November 10, 1926, $499,967.97.

At page 580, these Cash Items on November 19 to December 7 (compare Record, p. 411), were on

November 19, as to Sundry Banks, $1,833,084.44, Bills in Transit, $53,097.16, Cash Items, $20,731.44, and on December 7, the Sundry Banks were $1,713,-930.38, Bills in Transit were $84,664.89, and Cash Items were $105,699.89.

By reference to the Record, p. 411, we find the statement of Spaulding, Metschan and Charlton, under date of December 7, 1926, to the Board of Directors, as Examining Committee of this bank.

At page 589, top of page, and top of page 591, FRALEY shows what composed the complainants' Exhibit 29, constituting the memorandum given by him to the Examining Committee, November 19, 1926, the terms of part of which he describes at face, page, Record, 588. The exhibit speaks for itself.

At page 594, top of page, FRALEY testified that on the 30th of August, 1926, he made a list and supervised Mel Young, the bookkeeper, and that he thought Bates had his own list, and ***that any officer or director had access to the books just the same as he did and had they investigated the records, they could have ascertained and known in July, 1926, just what he knew.***

FRALEY confirms the amount of "Sundry Bank Items," Record, p. 593.

At page 613, OLMSTEAD, in July, 1926, discussed it with Price, and Price does not deny it, either.

At Record, p. 577, BATES shows that Price, Skinner and Stewart were informed in July, and also, later in the fall.

Contrast the foregoing with the sworn statements of LONGSHORE who was Assistant Vice President. See the Record at page 500, where the guarantee of June 8, 1926, is referred to, made by Wheeler, at that time for the full ten per cent. of capital surplus and advances to McCormick Lumber Company are specifically referred to. Next, examine his testimony, middle of page 506, and top of page 507, and note the carefulness of the witness not to hurt anybody, and then read in that connection top of page 524.

Now, a word about the concealment, ***and if there was concealment, then all the more reason for accounting:*** The examination of the testimony of Bookkeeper YOUNG in the Record, p. 579, virtually enables the Court to see at a glance exactly what was done. As well expressed by Presiding Judge Dietrich at the hearing, we know there is some $13,000,000.00 —according to the testimony—to account for, and some $12,000,000.00 that was handled in some manner as a comeback, leaving a million discrepancy so far as the mere Wheeler transactions were concerned, regardless of any other feature of the case. So a segregation of the way these accounts were kept in their three aspects of "Sundry Banks," "Bills in Transit," and "Cash Items" as described by the witnesses were found in the records of the bank and exhibited at pp. 579 to 581.

It is observable at the time that HOYT speaks, that on July 12 HOYT fixes the amount of "Cash Items" handed to him in a list by BATES, and there is then shown on the books of the bank, July 12, 1926, $238,510.97, and the Court's attention is called to the statement of "Sundry Banks" on that date, which is found much lower by the enormous amount of nearly half a million dollars than it was on November 16, 1926.

We proceed into August, and we find on August 30, 1926, when the other subordinate officers and BATES and HOYT and WALTER BROWN and JONES talked about what they heard or saw or was rumored, the amount is given as $254,825.49, and on those last days in August, there are ***no "Sundry Bank Items"*** at all. On July 23, 1926, there are ***"no Sundry Bank Items" at all.*** When we come into September 14 and 15, there is nothing but "Sundry Banks" and from September 24, 1926, to November 9, ***there is nothing but Sundry Banks.*** Then very significantly, November 10th and 13th, six days before the so-called Examining Committee made any investigation at all, there were several days that there were no Sundry Bank Items whatever. We find some nearly $700,000 worth of "Cash Items," when we add the column at page 580 on the Cash Items side. Then we find that the items drifted down from that side and increase on the "Sundry Bank side," and that there was absolutely a difference of some $200,000.00 in the Sundry Banks between the close and the beginning of January 3, 1927,

which is obvious, on pp. 580 and 581 of the Record under that date, and there are no Cash Items significantly from January 3 to February 11, 1927, then we find entered $169, 132.16. But respondents say, then, Jones found and they found, $792,962.00 themselves.

Now, as indicated by the Presiding Judge on argument, the $13,000,000.00 must have been accounted for in the course of the transactions or the bank's cash would have been short, because the witnesses state that these Cash Items had to be taken into consideration in determining the bank's money volume to do business. Hence it was a matter of every morning's examination by everybody to know what cash the bank had.

It is therefore perfectly obvious that by the system that carried over a period of months "***Sundry Banks***" showed a constantly inviting source of information as to why they should so enormously fluctuate. It was not natural to carry these one time by directing the bookkeeper to put them into bonds and judgments and again for Skinner to direct them to put them into Banks and other Sundries. ***It is not consistent with the claimed assertion of concealment.***

At the foot of page 64 of Respondents' Brief we find them state that concealment prevented discovery. What the Record shows about substituting checks so as to conceal in September does not accord with the statement that their purpose was to ascer-

tain what their situation was so as to lay the foundation for a corporation and get at the bottom of the affairs so an assessment could be predicated. Nor does it accord with the statement that all of the employees in the bank would falsify their records and books or even that they had to do it to conceal what is now claimed to be Olmstead's misapplications.

It is a demonstrable fact from the Record that carries its own uncontradicted conclusion that these records as kept by these several subordinate officers ***were open and observable so every other person in the bank could know just what those subordinate officers knew and they all knew it and the tabulated entries, Record, p. 580, running from September 21 to October 30, indicate it conclusively.***

To emphasize, we find that impairment was suggested, Record, p. 384, as early as November 18, 1925, by the Comptroller.

Mr. Hart said in his argument that the purpose of the Harris investigation, September 21, 1926, was to find out about the organization of some entity to take over frozen assets, but the Examiner, as shown upon Appellant's Brief, p. 29, wrote significantly about the very items alleged in the bills: "LENIENT CREDIT POLICIES WHICH HAVE NOT ONLY RESULTED IN HEAVY LOSSES BUT HAVE CARRIED THIS INSTITUTION ENTIRELY BEYOND ITS LEGITIMATE FIELD OF BANKING AND MADE IT A PARTNER AND IN SOME INSTANCES SOLE OWNER OF OTHER BUSINESS

WHICH IT NOW DIRECTLY OR INDIRECTLY OPERATES." (Then he refers to many items that are alleged in the complaint.) "THE FOREGOING ITEMS AGGREGATE MORE THAN $1,500,000.00 AND ARE INVESTMENTS WHICH YOUR EXAMINER CONSIDERS AS ENTIRELY OUTSIDE THE PURPOSE FOR WHICH BANKS ARE CHARTERED." (Record, Vol. 2, p. 478.)

Skinner admitted on the stand that the plan which was under consideration involved the taking out of $1,500,000.00 of assets. (Record, p. 484.)

Answering Mr. Hart's statement as to the cause of knowledge and what they knew and should have known, please note the letter as early as November 17, 1925 (Record, p. 382), written by the Comptroller to the Directors, in which, at the top of Record, p. 385, he states:

> "THE REPORT SHOWS, AS PREVIOUS REPORTS HAVE SHOWN, THAT MANY LARGE LINES OF CREDIT TO AFFILIATED INTERESTS ARE STILL IN THE BANK. IT IS REMEMBERED THAT TO SOME EXENT THESE LINES ARE THE RESULT OF ADDITIONAL ADVANCES MADE TO WORK OUT LOANS ALREADY UNDESIRABLE, BUT THEIR ADVERSE EFFECT UPON THE CONDITION OF THE BANK IS FELT NEVERTHELESS.
>
> IT IS THOUGHT THAT THE CONDITION OF THE INSTITUTION IS MORE SERIOUS THAN THE DIRECTORS WILL PERMIT THEMSELVES TO BELIEVE."

Please note that April 6, 1926, still answering Mr. Hart, the Comptroller writes to these directors, Record, p. 393:

> "YOU, OF COURSE, UNDERSTAND THAT YOU CANNOT BE PERMITTED TO CARRY INDEFINITELY DOUBTFUL ASSETS AND SHOW AND REPORT THEM AS GOOD.
>
> "AN EXHAUSTIVE REVIEW OF PAST REPORTS AT THE TIME OF PREVIOUS EXAMINATIONS FORCED THE CONCLUSION THAT THE CONDITION OF YOUR BANK IS MORE SERIOUS THAN THE DIRECTORS AND MANAGEMENT BELIEVE AND THE CURRENT REPORT BEARS OUT THAT CONCLUSION. UNLESS, THEREFORE, THERE IS A DECIDED CHANGE FOR THE BETTER BY THE TIME OF THE NEXT EXAMINATION IN THE CHARACTER OF ASSETS CLASSED AS SLOW AND DOUBTFUL IN THE LAST REPORT, IT WILL BE NECESSARY TO PLACE THEREON MUCH LOWER VALUATIONS THAN HAVE BEEN GIVEN IN FORMER REPORTS, AND THIS, OF COURSE, WILL NECESSITATE A HEAVY ESTIMATE OF LOSSES."

Further answering Mr. Hart, the report of the Examiner addressed to Olmstead as of September 21, 1926, but really in a letter of October 22, 1926, Record, p. 401, contains the items many of which were listed in the bills of complaint, which showed in the recapitulation on page 406 of the Record, an aggregate non-bankable amount greater than the capital and surplus and undivided profits of the

bank, as the Court was informed by the Appellants on the oral argument, which, then, Mr. Hart disputed as incorrect. And this was a matter for special comment as pointed out in the argument by the Federal authorities in a letter to the Directors, December 2, 1926, Record, pp. 408-410.

The agreement which as near as the date can be fixed was the 2nd of March (Record, p. 459), in the year 1927, especially stated that the bank "BEING IN AN INSOLVENT CONDITION CANNOT BE PERMITTED TO CONTINUE TO OPERATE UNTIL ITS SOLVENCY HAS BEEN IN SOME MANNER RESTORED."

Again at Record, p. 464, in the controversy about the entries on the books concerning the bank building, the trial Court took part in the examination of the witnesses, while Mr. Hart was attempting to explain, and made the following statement: "IT LOOKS FROM WHAT I CAN GATHER THAT THEY SIMPLY SWELLED THE ASSETS $310,000.00, AND IN ORDER TO GET THE $310,000.00 INTO PROFIT AND LOSS-BOOKKEEPING." And to this the witness Skinner, one of the defendants and vice president, answered: "THAT IS CORRECT."

The Court repeated the question again at Record, p. 464, and finally the witness so answered again; and thus emphasized, Mr. Hart let the matter alone. (Vol. 2, p. 464.)

Skinner, himself, produced the Wylde Report, showing that March 25, 1926 (Record, p. 475), the so-called Wheeler Line described by all of the witnesses as the total of the items shown in the Wylde Report, aggregate $802,365.28. (See, also, Record, p. 477.)

On the 5th day of March, the Examiner Harris informed the directors that, among other things, their capital was impaired, as all along it had been impaired, and yet on March 23rd, 1927, they, these same respondent directors, issued a published bank statement to their stockholders and depositors, that the capital and surplus and undivided profits of this bank were unimpaired and of the same amount as at the last call, or substantially like thereunto.

YET ON THE ELEVENTH DAY OF FEBRUARY, NINETEEN TWENTY-SEVEN, THEY ALL SWEAR THAT THEY ALL KNEW OF THE MISAPPLICATION OF FUNDS OF THIS BANK BY WHEELER AND OLMSTEAD FOR WHICH THEY AS WITNESSES APPEARED IN THE CRIMINAL CASE TO ESTABLISH, AND UPON THIS EVIDENCE, OLMSTEAD AND WHEELER WERE EACH CONVICTED. HOW UNDER THE LAW CAN THESE RESPONDENTS KNOW A THING IN FEBRUARY AND YET IN MARCH ASSERT THE VERY OPPOSITE OF THE FACT THEY SWEAR THEY KNEW IN FEBRUARY?

They also told and published to the world in The Oregonian on March 1st, 1927, that the Pittock es-

tate had acquired a larger interest in the bank and that Mr. Price had been made president and that the bank would continue as one of high responsibility with these same directors. (Record, p. ...)

UPON WHAT SPECIES OF MENTAL LEGERDEMAIN DOES THE PRESENT LAW DEPEND IN ADMINISTERING THE AFFAIRS OF THESE QUASIPUBLIC INSTITUTIONS if such a situation is to be countenanced?

IF IT WAS NECESSARY IN 1925 TO CONSIDER AS THE COMPTROLLER OF THE TREASURY POINTED OUT, A VISIBLE AND EXPECTED IMPAIRMENT OF CAPITAL SURPLUS AND UNDIVIDED PROFITS, HOW CAN THE INACTION OF THESE RESPONDENTS BE SQUARED WITH THE DILIGENCE AND DUTY THE LAW EXACTS UNDER SUCH CIRCUMSTANCES?

In full support of the bills of complaint in this case and fully answering the oral argument of Mr. Hart as well as the matters put forth in brief by Mr. Maguire, the Circuit Court of Appeals for the Ninth Circuit in the recent case of *Adams v. Clarke,* 22 Fed. (2nd) 957, speaking through Mr. Circuit Judge Dietrich, at p. 959 (3) said:

> "AND APPARENTLY THE BANK IS CHARGEABLE WITH KNOWLEDGE DISCLOSED BY ITS RECORDS AND THE INFORMATION POSSESSED BY ITS DIRECTORS. *Curtis v. Connly, Supra.* BUT

HERE, DURING THE ENTIRE PERIOD IN QUESTION, DEFENDANTS NOT ONLY HELD A MAJORITY OF THE CAPITAL STOCK, BUT CONSTITUTED THE ENTIRE BOARD OF DIRECTORS. AS TRUSTEES IN EXCLUSIVE CONTROL OF THE BANK'S AFFAIRS, THEY CANNOT TAKE ADVANTAGE OF INACTION FOR WHICH THEY ALONE ARE RESPONSIBLE." (Citing many cases.)

Recently District Judge Sibley of the Northern District of Georgia, Atlanta Division, in the case of *Anderson v. Gailey*, 33 Fed. (2d) 589, at page 593 had these significant things to say:

"THIS, HOWEVER, WAS WELL KNOWN TO THE BANK EXAMINERS AND COMPTROLLER OF THE CURRENCY, AND SEVERELY CRITICIZED BY THE LATTER LONG BEFORE THE LIMITATION PERIOD. ANY ONE EXAMINING THE BOOKS AND SEEING THESE DEBTS RENEWED, WITHOUT REDUCTION, FOR YEARS, WOULD HAVE SUSPECTED SOMETHING WAS WRONG, ESPECIALLY IN THE FINANCIALLY TROUBLOUS TIMES WHICH PREVAILED DURING 1920 TO 1926 IN GEORGIA. **ANY INQUIRY WOULD HAVE DISCLOSED THE TRUTH.** ALL THE CASES REQUIRE DILIGENCE OF THE PLAINTIFF IN DISCOVERING THE RIGHT OF SUIT. IT IS TRUE THE DIRECTORS, ALTHOUGH STRANGERS TO THE BANK'S CREDITORS, **WERE IN A CONFIDENTIAL RELATIONSHIP TO THE BANK AND ITS STOCKHOLDERS, AND WOULD BE HELD IN STRICT GOOD FAITH AND MOST FULL DISCLOSURE IN**

DEALINGS BETWEEN THEM AND THE BANK OR ITS STOCKHOLDERS. (*Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232), AND THIS SAME RELATIONSHIP OF CONFIDENCE MODIFIES THE DILIGENCE REQUIRED OF THE BANK OR STOCKHOLDERS IN DETECTING OR DISCOVERING A FRAUD, AS WAS RECOGNIZED IN THE GEORGIA CASES CITED ABOVE."

The same excuses made upon argument in this case were made before Circuit Court of Appeals, Fourth Circuit, in the case of *Gamble v. Brown*, 29 Fed. (2d) 377, wherein among other things, at p. 371, that Court said:

"It is contended by the defendants, however, that, even if the examining committee had functioned, it could not have discovered the embezzlement of the notes by Dean. It is pointed out that K. B. Cecil, a bank examiner and expert accountant, made examinations of the bank in 1914 and failed to discover the shortage until his third visit. The bank examiner made three examinations—on February 10, August 7, and August 22, respectively. The shortage of notes was discovered as the result of the examination of August 7. Certain notes, which should have formed part of the assets of the bank, were represented by memoranda, indicating that they were in the hands of other banks for collection. Between August 7 and August 22, the examiner communicated with these banks and discovered that notes aggregating approximately $17,000, which were supposed to be in their hands, were not so held. Hence he returned on August 22 and closed the bank. A similar check was made by the examiner on February 10, but no short-

age was discovered. But it was possible for Dean at that time to have substituted in the note case, without detection, other worthless notes of the Farmers' Loan & Trust Company which he then had on hand. Such a substitution, however, could not have been made later on, when the notes would have matured. An auditing committee of the bank in the ordinary course would have checked the memoranda of notes in other banks for collection, precisely as did the examiner. The directors were culpable in this respect, and are liable to the bank for the losses which their neglect made possible. We think that the following comment of the special master was justified by the evidence.

"It cannot be urged that the fraud alleged to have been committed by H. H. Dean was so ingeniously devised and concealed that same would have escaped detection, had the directors been more vigilant, or had proper audits been made of the bank's affairs. The proof shows that the directors were not vigilant, or even careful, and that audits were not made. Had the directors prudently and carefully performed their duties, it is fair to presume either that Dean would not have attempted his dishonest practices, or that they would have been detected. The directors' indifference opened the way and Dean steppd into it."

Moreover, as in that case, so in this, there were times when the Discount Committee did not function, and the evidence shows here that the Examining Committee did not function. (Record, p. 481.)

(See, also, Record, p. 410.)

In *M'Cormick v. King*, Circuit Court of Appeals for the Ninth District, 241 Fed. 743, Mr. Circuit Judge Hunt had this to say:

> "**NO OTHER BANKER WAS CALLED UPON TO TESTIFY TO SUCH A CUSTOM, AND WE WERE DISPOSED TO LOOK UPON THE TESTIMONY AS BUT AN EFFORT OF ONE OVER-ZEALOUS TO HELP EXCUSE HIMSELF FOR HIS OWN CONDUCT IN THE PREMISES,** AND WHOSE EXCUSE IS INCOMPATIBLE WITH THE PRESUMPTION THAT BANK OFFICIALS WELL AND TRULY EXERCISE THEIR DUTIES AND KEEP WITHIN THE LIMITATIONS OF THE BY-LAWS WHICH HAVE BEEN REGULARLY ADOPTED."

> "IN THE NEXT PLACE, EVEN IF IT WERE TRUE TO AN EXTENT, SUCH A PRACTICE WOULD BE NO AUTHORITY FOR BANK OFFICIALS TO ALLOW CUSTOMERS TO OVERDRAW IN SUMS AND INCUR LIABILITY IN EXCESS OF ONE-TENTH OF THE AMOUNT OF THE CAPITAL STOCK OF THE BANK PAID IN. **FOR MONTHS BEFORE THIS BANK FAILED THE FREQUENT PAYMENT OF LARGE OVERDRAFTS MUST HAVE MADE IT APPARENT TO THE LOAN AND DISCOUNT COMMITTEE OF THE BANK, THAT, IF SUCH ACTS OF THE OFFICERS WERE CONTINUED, IT WOULD MEAN A SACRIFICE OF THE INTERESTS OF THE STOCKHOLDERS.** BUT THE PRESIDENT AND VICE PRESIDENT AND CASHIER WENT ON IN THE PRACTICE OF DEPARTURE FROM DUTY, AND SUSPENSION FOLLOWED."

"WE CAN THEREFORE REACH NO CONCLUSION **OTHER THAN THAT THE ACTS REFERRED TO WERE NOT MERE ERRORS OF JUDGMENT, BUT WERE IN GROSS MISMANAGEMENT OF THE BANK;** for which the defendants King and Andrews are liable under the general principles of the common law, as well as under the statutes heretofore quoted."

At page 746:

"WITH RESPECT TO DEFENDANT BOWERMAN, OUR OPINION IS THAT HIS LIABILITY IS ALSO TO BE MEASURED PRIMARILY BY THE RULES OF THE GENERAL LAW, AND THAT HIS WANT OF KNOWLEDGE OF THE GROSS MISMANAGEMENT OF KING AND ANDREWS WAS DUE TO SUCH INATTENTION TO THE DUTY WHICH WAS IMPOSED UPON HIM OF EXERCISING A REASONABLE SUPERVISION OVER THE CONDUCT OF THOSE IN CHARGE OF THE BANK THAT HE, TOO, IS LIABLE TO THE SAME EXTENT AS ARE KING AND ANDREWS, AND THAT DECREE SHOULD ACCORDINGLY GO AGAINST HIM. *Allen v. Luke* (C. C.), 163 Fed. 1018; *Williams v. Brady* (D. C.), 221 Fed. 118; ID. (D. C.), 232 Fed. 740."

That they were not doing a banking business, but were in the character of making partnership investments with other concerns, was deliberately characterized by the Examiner and he pointed out that they were not doing a banking business. Therefore, it suffices to say, that if anyone would look at the

Record, pp. 388 and 402, without prejudice, and with a fair and open mind, we find a list of an host of items appearing in the bills of complaint as far as the complainants could reasonably specify (Record, pp. 11 and 12, and Record, pp. 173 and 174), and they are confirmed by Examiner's Report and confirmed again by the Comptroller himself on p. 361 of the Record. Each supporting the allegations of the bills.

Lengthy quotations are made in the Respondents' Brief from the *Bates* case, pp. 56 and 63, but close examination shows the distinction and radical difference from the case at bar, save and except the application of by-laws upon which aspect the Bates case does agree with this. The dissimilarity rests upon the ground that every Director in this case or officer who was a Director in this case, was unlike those in *Briggs v. Spaulding*, or *Bates v. Dresser*. Olmstead, Stewart, Skinner and Price received large salaries (Record, p. 339), while Charlton, Metschan and Spaulding were specially paid (Record, p. 529), and Directors received daily compensation set forth (Record, by-law 19, p. 338, and as also top of p. 530 of Vol. II of the Record.) (Also, Record, p. 454.)

A still stronger reason that respondents ignore, rests in the documentary evidence itself where Phil Metschan in his letters as Director to Burckhardt, assured Burckhardt that everything was all right, and that he, Metschan, would protect his interests, and yet within three months, Metschan, knowing all

of the things that he knew, knew that the bank was headed for disaster. Olmsted's letters to Ballin and soliciting Ballin not to sell his stock, and Price's communication with Ballin by telegraph, all of which are in the evidence in exhibits, are indicative of the assurance of these people to the separate complainants, and furnish all the more reason for the respondents to account.

Again, Respondents deliberately overlook Exhibits 60 and 11, wherein Skinner, Stewart, Olmstead and others of these Directors and Officers invited Ballin and Burckhardt to join with them upon assurance of ***the situation denominating stock control***, and that the bank was all right, and therefore, the necessity of preserving it, when they knew it was not, furnishes written and documentary evidence again like the books of the bank of the necessity for these Directors to account for the performance of their fiduciary relation, all of them—***not Olmstead alone.***

It is not a case of single or individual import. The Corporation was entitled to have the necessary performance of duty to relieve it of disaster incurred by acts of these directors.

Will the Court, please, examine the Record at pages 418 and 419, and also, at pages 430 and 433, and again at pages 425 to 429.

With respect to this contingent liability of the stockholders (which the briefs of respondents at-

tempt to make it appear that these directors relieved them from, and that these defendant directors are to be commended for putting into the bank, that which they knew to be taken out), the Circuit Court of Appeals for the Ninth Circuit, speaking through Circuit Judge Gilbert, February 18, 1929, in the case of *Chase v. Hall*, 30 Fed. (2d) 195, at p. 197, said:

> "THE APPELLANTS CONTEND THAT THEY ARE NOT LIABLE FOR THE ASSESSMENT FOR THE REASON THAT THE DEBT IN THE INSTANT CASE WAS NOT INCURRED IN THE ORDINARY COURSE OF BUSINESS OR IN THE ORDINARY COUSE OF LIQUIDATION. WE CANNOT AGREE THAT THE EXECUTION OF THE NOTE WAS OUT OF THE ORDINARY COURSE OF LIQUIDATION. IT HAS BEEN HELD THAT WHEN A NATIONAL BANK ASSUMES THE DEBTS OF AN INSOLVENT BANK IN CONSIDERATION OF A TRANSFER OF A PORTION OF ITS ASSETS AND A NOTE FOR THE BALANCE, THE NOTE REPRESENTS THE CONTRACTS, DEBTS, AND ENGAGEMENTS OF THE INSOLVENT BANK FOR WHICH ITS STOCKHOLDERS ARE RESPONSIBLE. *Wyman v. Wallace*, 201 U. S. 230, 26 S. Ct. 495, 50 L. Ed. 738; *Hulse v. Argetsinger* (D.C.) 12 F. (2d) 933."

So, it is apparent in this case that the stockholders, complainants and others remain responsible by the acts of these directors, and have a right to know what became of the assets; and receive the values of their respective stock intrests decreed to them on the basis of what the true facts would show.

Respectfully submitted,

WILLIAM C. BRISTOL,
Attorney for Appellants.

September 21, 1929.